No. 2670

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO VALLEY ELECTRIC RAILROAD COMPANY (a corporation),
Plaintiff in Error,

vs.

TAGGART ASTON,
Defendant in Error.

ANSWER OF DEFENDANT IN ERROR TO SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

JACOB M. BLAKE,
Attorney for Defendant in Error.

Filed this.....day of April, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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In reply to the point in the supplemental brief for plaintiff in error that the Railroad Commission did not construe the order of August 13, 1912, as permitting the contract of September 22, 1913, between the railroad company and Mr. Aston, we answer:

First, that under the terms of that order, in force and unmodified at the date of the contract, it is not susceptible of any other construction; and

Second, that no modifications of the order at later dates, to wit: on September 27th and December 30,

1913, by the Railroad Commission were inconsistent with such a construction; and

Third, that the conduct of the Railroad Commission has been uniformly consistent with the construction of the order of August 13, 1912, which sustains the validity of the contract with Mr. Aston.

THE ORDER OF AUGUST 13, 1912.

This order made no provision in express terms for the expenditure of *any moneys* by the railroad company, other than the payment of commissions on the sale of its stock. The order recited that,

> "Applicant be ordered to submit to the Commission for its approval before the execution thereof, all general contracts, exceeding the amount (of) $1000."

Lexicographers say the word "general" means "common to many or the majority; extensive though not universal."

It is a relative term the meaning of which must be determined by the process of inclusion and exclusion.

> Times Printing Company v. Star Pub. Co., 51 Wash. 667; 99 Pac. 1042.

Paraphrasing the rule laid down in People v. Vickroy, 266 Ill. 384, as to what constitutes a "general" law, we may say a contract is "general", where a distinction is sought to be created as here, "not because it embraces all" contractual obliga-

tions, "but because it may embrace all" contracts "in a like situation." The necessity for a definition in the order itself of the term "general contracts" not only became imperative but it laid the ground for the conclusive implication, subsequently acted upon by both the railroad company and the Commission, that certain contracts were not within the limitation.

The Commission then proceeded to define the term, general contracts in the order itself under a provision,

> "And in addition thereto said company shall submit to this commission for its approval the form of all contracts for the sale or exchange of stock *and before the execution thereof all contracts for grading, bridging, track,* including *materials and to labor, equipment of all kinds, and all materials, labor* and *property* involving costs in excess of $1000.00."

Not only is the defendant in error protected by the rule of statutory construction that general terms of a statute or of an administrative order are controlled by special provisions touching the same subject, but we also have here a clearly expressed design on the part of the Commission to leave the railroad company free to fulfill all of its charter and franchise duties and responsibilities necessary to bring its railroad project forward to the beginning of the period of actual construction.

There was no limitation upon its power to contract for *services.* It cannot be contended that either the services of Mr. Aston in preparing a

report for Mr. Wilsey's use abroad, or the latter's services for the company in behalf of obtaining a proposal for a bond underwriting agreement would involve a contract for *grading, bridging, track, materials and labor, equipment or property;* and, it may be confidently said, it was never the purpose or intention of the Commission, that the railroad company should stand idle and refuse to perform its necessary and responsible duties under its franchise and charter in connection with initiating the sale of its bonds. The Court will take judicial notice of the fact that a 150 mile railroad system cannot be built and equipped with the proceeds of $750,000 par value of preferred stock discounted to 80. No contention is made, nor is it necessary, that a contract, under the terms of the Public Utilities Act, authorizing the eventual sale and disposition of the bonds would not have to receive the approval of the Commission; but it seems plain, in the light of common knowledge and experience, that such *services* as Mr. Aston contracted to perform for the company in aid of efforts to be performed abroad in behalf of obtaining a proposal for such a contract, were essentially of the same kind and nature as those that the counsel for the company had to undertake when the company was first organized, and as those in a hundred and one other instances made necessary by the nature of the project itself while it was still in the process of formation.

THE INTENTION OF THE COMMISSION TO LEAVE THE RAILROAD COMPANY FREE TO PERFORM ITS FRANCHISE DUTIES AND OBLIGATION NOT CHANGED BY ANY TERMS OF SUBSEQUENT ORDERS.

The discussion of this point does not concede that the existence of such an intention would affect the obligation of the company to Mr. Aston as fixed by the terms of the order of August 13, 1912, but involves only the question of referring to the later orders in aid of a proper interpretation of the primary order.

Again we find that the $1000.00 limitation applies wholly to contracts for grading, bridging, etc., etc.

We also find that at this time the company was by implication deprived by the Commission of the services of a regularly retained engineer; the recital in the order of September 27, 1913, being:

> "The need of an engineer at this time where no construction is under way is not so apparent."

The Commission evidently had in mind that the railroad company while engaged in the attempt to secure a proposal for an underwriting would out of the necessity of the case be compelled to pay the expenses of engineers detached in interest from the railroad company, and having the confidence of the underwriting syndicate. The Commission was wisely forestalling a *double expense* for engineering services at this point in the development of the project.

The order of December 30, 1913, varies somewhat the phrasing of the $1000.00 limitation upon making contracts, but in no way modifies the intention of the Commission as expressed in the order of August 13, 1912. It is as follows:

> "Provided, however, that before entering into any contract of $1000.00 or more, for the *construction of said road or for the acquisition of materials or service therefor,* such contract shall be submitted to and obtain the approval of this Commission."

When this order was made the railroad company was about to commence the construction of a 12-mile unit of its main line and had no money on hand except such as had been derived from the sale of its stock, and its only other securities were some $150,000 worth of notes given on account of subscriptions to stock under the guaranty of the Commission that construction would not be commenced until $750,000 of stock had been sold. The amount of cash was $93,144. In this state of affairs can it be said with any degree of reasonableness, that even at this time there was an intention on the part of the Commission, when authorizing the construction of 12 miles only of main line, to disable the company from entering into those contracts for services which would have for their object to procure a bond underwriting in aid of the construction of the whole 150-mile system contemplated by the charter and franchise of the company.

That it had no such intention is conclusively evidenced, we think, by its consistent ratification even

after it had established a limitation upon the company's *general expense* account of first $1000.00 and afterwards, $1250.00 per month, of expenditures on other accounts (orders of September 27th and December 30, 1913).

The Railroad Commission acted upon the construction we contend for in ratifying promotion expenses, totaling $3,159.00, one item of which amounted to $1,287.15, in its order of December 30, 1913.

The foregoing expenses were incurred while the order of August 13, 1912, was in force, or prior thereto. There is a recital (Trans. p. 83) in regard to them as follows:

> "Prior to and for a time after the incorporation of applicant, certain men were active in the promotion of the railroad project for which applicant was incorporated. During such activity they expended, on behalf of the project, various sums, totaling $3,159.55, which they now ask this commission to pay in par of preferred stock."

These expenses were approved by the Commission in addition to those amounting to $40,468.42 approved by the order of September 27, 1913. This we respectfully submit, closes all that need be said in behalf of the construction that should be placed upon the terms of the order of August 13, 1915, to support the judgment in this case.

Counsel in the oral argument went considerably outside the record, so far as the single issue of law is concerned that is before the Court for decision,

to suggest that the recovery here is greatly disproportionate to any services rendered. It is true that the judgment is for the repudiation of an express contract, notice of which was given only some eight or ten days after the date of the contract. But it is also true that Mr. Wilsey went to London and in an interval between October 1, 1913, and sometime in January, 1914, Mr. Aston, with the knowledge and consent of the company, performed all the services originally contracted for, and his reports, two in number, were used by Mr. Wilsey in presenting the project to interested parties abroad: and Mr. Wilsey's efforts in this behalf were persisted in until the company absolutely refused to furnish him necessary expense money to allow a European representative of the syndicate to investigate the company's project on the ground. A judgment based upon the *quantum meruit* set up in the second cause of action would have raised the same issue of law as is here raised upon this appeal, and the findings and judgment rest on the indisputed facts sustained by the allegations based upon an express contract in the first cause of action in the complaint to which no exception was taken below.

In conclusion we may say that the defense of the plaintiff in error below and the contention on this appeal involves nothing more than an attempt to take advantage of its own inaction in not presenting the claim of Mr. Aston to the Railroad Commission for ratification. *Such ratification was not*

necessary, but if it had been it would seem that the company should not be allowed thus to take advantage of its own wrong. We have never desired to appear in the attitude of attacking the Railroad Commission; but on the other hand we have deemed it to be of the utmost importance that, under circumstances such as are presented by the record here, it should be understood that the public dealing with railroad companies are not put to hazards such as would attach in all cases of contracts between them and third parties, if the construction of the Constitution and laws of California in reference to public utility corporations as contended for here by the plaintiff in error should be upheld. We respectfully urge that it would be neither correct law nor proper ethics to sustain a defense that would allow the plaintiff in error to go to the Commission to get ratification of accounts it desired to pay and, under the same circumstances, seek to evade the payment of an equally just account it did not desire to pay, by deliberately refraining from asking a ratification by the Commission.

Dated, San Francisco,
April 3, 1916.

Respectfully submitted,

JACOB M. BLAKE,
Attorney for Defendant in Error.